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REPORT & RECOMMENDATION

THE EVIDENCE

Based on the testimony adduced at the evidentiary hearing and the exhibits attached to the

1 parties' papers, the court finds the following facts have been established by a preponderance of the
2 evidence. At approximately 9:00 a.m. on July 10, 2009, Special Agent Gregory Fitzgerald of the
3 Department of Veteran Affairs Office of the Inspector General ("VAOIG") contacted Perelman at his
4 place of employment, the VA's Northwest Clinic. Perelman had been employed as a clerk with the VA
5 Southern Nevada Healthcare System for approximately three years. SA Fitzgerald identified himself
6 as a special agent with the VAOIG and stated that he was conducting an investigation and wanted to
7 speak with Perelman. Perelman agreed to meet SA Fitzgerald at his office at the East Clinic for an
8 interview at 10 a.m.

9 Concerned about the interview, Perelman went to speak to his union steward, Gregory
10 Blackburn in Blackburn's office. Blackburn had previously represented Perelman in a union matter.
11 Blackburn testified that Perelman seemed anxious and was seeking representation from Blackburn
12 because he had to go speak with an agent from the VAOIG. Blackburn called the agent, who was later
13 identified as SA Fitzgerald, and asked him why he needed to speak with Perelman. Blackburn
14 specifically inquired whether it was a criminal matter. The agent told Blackburn that it was. Blackburn
15 testified, "I thanked him and I hung up the phone and then I turned to Mr. Perelman and I told him I
16 can't help you because it's a criminal investigation." Blackburn explained that he could not accompany
17 Perelman because it was a criminal matter, and the union does not get involved in criminal matters.
18 Blackburn then advised Perelman, "if he got there and felt uncomfortable, he should thank them and
19 walk out. I said that's what I would do."

20 After leaving Blackburn's office, Perelman drove himself to the East Clinic. The drive was
21 approximately thirteen miles. SA Fitzgerald met Perelman in the reception area of the clinic and
22 escorted him through the clinic to a conference room. The conference room had a second door which
23 led to the outside and had windows to the outside. The room was approximately fifteen feet by fifteen
24 feet and contained one large rectangular table with enough seating for ten people. Neither conference
25 room door was locked. Special Agent Michael Morse joined SA Fitzgerald and Perelman in the
26 conference room. Both agents presented their credentials. SA Morse was wearing a suit jacket, slacks,

1 and white dress shirt. SA Fitzgerald was dressed in a suit and tie. Neither agent's sidearm was visible.

2 After checking Perelman's identification, SA Fitzgerald asked him to take a seat. He then
3 explained to Perelman that he was a special agent with the VAOIG, "just like any other special agent
4 he had heard of from another agency such as the FBI, ATF, DEA, except that my investigations involve
5 criminal matters affecting the VA." He further explained that Perelman was there voluntarily, that he
6 was not under arrest, that he did not have to speak to the agents, and if he did speak with the agents he
7 could stop and leave at any time. Perelman stated that he understood and was willing to speak with the
8 agents.

9 SA Fitzgerald explained that he and SA Morse investigate various types of crime, including false
10 claims submitted to the VA and that's what they wanted to talk to Perelman about. The agents produced
11 a *Garrity* federal employee advisement of rights form. SA Fitzgerald read the form to Perelman and
12 gave it to Perelman to read. The *Garrity* form states: "You are being contacted to solicit your
13 cooperation in an official investigation regarding misconduct or improper performance of official duties.
14 . . . The matter under investigation could constitute a violation of law that could result in the criminal
15 prosecution of the responsible individuals." The form provides a blank to fill in what "This inquiry
16 concerns," in which the agents wrote "False Claims." Beneath this section is typed:

17 You have the right to remain silent if your answers may tend to incriminate you. If you
18 do decide to answer questions or make a statement, you may stop answering at any time.

19 Anything you say may be used as evidence both in an administrative proceeding or any
20 future criminal proceeding involving you.

21 If you refuse to answer the questions posed to you on the grounds that the answers may
22 tend to incriminate you, you cannot be removed (Fired) solely for remaining silent,
23 however, your silence can be considered in an administrative proceeding for any
24 evidentiary value that is warranted by the facts surrounding your case.

25 Perelman signed the form under the "Acknowledgment" section, which states:

26 I understand the warnings and assurances stated above and I am willing to make a
statement and answer questions voluntarily. No promises or threats have been made to
me and no pressure or coercion of any kind has been used against me.

1 SA Fitzgerald explained that the interview would be tape recorded and turned on the recorder.¹
2 The interview lasted approximately fifty minutes. Nearly twenty-four minutes into the interview, and
3 after having elicited several inculpatory statements from Perelman, the agents made it explicit that
4 Perelman, himself, was the subject of their criminal investigation and the matter was being sent to the
5 United States Attorney's Office. One agent told him "this is not an administrative matter. This is not
6 a let's just get the VA to re-review it, maybe uh, you know, your disability claim." Perelman began to
7 express concerns about his family, his job, and his life. He did not ask to end the interview. The
8 questioning continued, and Perelman made more inculpatory statements. Around forty minutes into the
9 interview, Perelman stated that he was "all stressed out," and took some kind of pill. The agents offered
10 Perelman water with which to take the pill, which he declined. Perelman's demeanor, speech, and
11 ability to focus did not appear to change after he took the pill. At the end of the interview, the agents
12 turned off the recorder and asked whether Perelman would be willing to make a written statement.
13 Perelman agreed that he would.

14 Before making the written statement, Perelman asked to use the restroom, which was located
15 outside the conference room. SA Fitzgerald explained where it was, and Perelman walked there and
16 back to the conference room unescorted. He sat down to begin the written statement. SA Fitzgerald
17 explained that he would help with the statement for the purposes of clarity and length and read aloud
18 the advisement of rights at the top of the form.² SA Fitzgerald then went over statements that Perelman
19 had made, asking if each was correct. If Perelman agreed that a statement was correct, SA Fitzgerald
20 told him to write it down. At one point, Perelman wanted to write a statement differently than how SA
21 Fitzgerald had said it, and SA Fitzgerald told Perelman to write it Perelman's way. When the written
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23 ¹ The recording of the interview was submitted as Exhibit C to the Motion (#18) and admitted as the
24 government's Exh. 1 at the hearing.

25 ² With the identifying blanks filled in the form reads, "I, David M. Perelman, residing at 7620 Twisted Pine
26 Ave., having been duly sworn as provided by law, make the following statement freely and voluntarily to SA Greg
Fitzgerald, a Special Agent with the Office of Inspector General, Department of Veteran Affairs, Criminal Investigations
Division:" Exh. D to Mot. (#18).

1 statement was complete, Perelman was directed to read it over to make sure he agreed with it. SA
 2 Fitzgerald had Perelman initial any line-outs or scratch-outs and sign the statement. Perelman then left
 3 the clinic and drove away.

4 DISCUSSION

5 Perelman concedes that because he was not in custody at the time of the interview, the agents
 6 were not required to give him an advisement of *Miranda* rights. Reply (#23) at 2; *see Miranda v.*
 7 *Arizona*, 384 U.S. 436 (1966) (holding that the Fifth Amendment requires suppression of statements
 8 made during a custodial interrogation unless the defendant has been apprised of, and validly waives,
 9 his rights to silence and/or the presence of an attorney). The question here is solely one of
 10 voluntariness: whether Perelman's confession was the "product of a rational intellect and free will," *see*
 11 *United States v. Pinion*, 800 F.2d 976, 980 (9th Cir. 1986) (citations omitted), or whether "the
 12 government obtained the statement by physical or psychological coercion or by improper inducement
 13 so that the suspect's will was overborne." *United States v. Bautista*, 362 F.3d 584, 589 (9th Cir. 2004)
 14 (citing *United States v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981)) (quoting *United States v. Male*
 15 *Juvenile*, 280 F.3d 1008, 1022 (9th Cir. 2002)) (other citation omitted); *see also Haynes v. Washington*,
 16 373 U.S. 503, 513-14 (1963). It is the government's burden to prove by a preponderance of the
 17 evidence that a criminal defendant's statement was voluntary. *Bautista*, 362 F.3d at 589 (citing *United*
 18 *States v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981)). The factual inquiry focuses on (1) the conduct
 19 of law enforcement officials in creating pressure, and (2) the defendant's ability to resist that pressure.
 20 *Mincey v. Arizona*, 437 U.S. 385, 399-401 (1978). Coercion by the authorities is a necessary element
 21 of this test. *Colorado v. Connelly*, 479 U.S. 157 (1986).

22 Citing *Commonwealth of the Northern Mariana Islands v. Mendiola*, 976 F.2d 475, 484 (9th
 23 Cir. 1993) (overruled on other grounds by *George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997)),
 24 Perelman asserts that 18 U.S.C. § 3501(b) should serve as a starting point in determining the
 25 voluntariness of a confession. Section 3501(b) provides that the following factors be considered in
 26 making the determination:

1 (1) the time elapsed between arrest and arraignment; (2) the defendant's knowledge of
2 the nature of the offenses for which he was suspected or charged; (3) whether the
3 defendant was advised or knew that he was not required to make a statement and that
4 any statement made could be used against him; (4) whether the defendant was advised
5 of the right to the assistance of counsel; and (5) the presence or absence of counsel when
6 questioned and when making the confession.

7 The presence or absence of any of the above-mentioned factors to be taken into
8 consideration by the judge need not be conclusive on the issue of voluntariness of the
9 confession.

10 Perelman points to factors (3), (4), and (5) of § 3501(b) as particularly relevant to this case.
11 Specifically, Perelman argues that the *Garrity* advisement of rights form deceptively gave him the
12 impression that he was being investigated for workplace, rather than criminal, misconduct, and further
13 failed to advise him of his right to the assistance of counsel. Consequently, the agents were able to first
14 convince Perelman that he was the target of an administrative investigation, then inform him of the true
15 nature of the interview only after eliciting inculpatory statements. Reply (#23) at 3-4 (analogizing to
16 *Missouri v. Seibert*, 542 U.S. 600 (2004) (plurality opinion)) (holding that the district court must
17 suppress statements made after a *Miranda* warning where post-*Miranda* confessions are the result of
18 a deliberate two-step interrogation technique).

19 These factors do little to bolster Perelman's argument. Factor (3), whether defendant was
20 advised or knew that he was not required to make a statement and that any statement made could be
21 used against him, was satisfied in this instance. SA Fitzgerald told Perelman directly that he didn't have
22 to speak with the agents, and that should he decide to speak to the agents he could stop and leave at any
23 time. The *Garrity* form, which SA Fitzgerald read to him and which Perelman himself read and signed,
24 further advised him, "You have the right to remain silent if your answers may tend to incriminate you.
25 If you do decide to answer questions or make a statement, you may stop answering at any time."
26 Factors (4) and (5), which relate to the presence of counsel are inapplicable here. Perelman, himself,
concedes that the agents were not required to advise him of his right to the assistance of counsel,
because he was not in custody. While counsel may have been helpful to Perelman during the course
of the interview, lack of counsel in such a non-custodial interview does not, in itself, render the

1 circumstances surrounding the confession inherently coercive.

2 The uncontroverted testimony of the agents indicates that the physical aspects of the interview
3 were not coercive. The conference room was not particularly small, had windows to the outside, and
4 contained two exits, one of which led outdoors. Neither exit door was locked so as to prevent exit. The
5 interview did not take place in either an isolated setting or in an environment overrun with police
6 presence; it was in a room within a VA clinic during the clinic's normal business hours. Perelman was
7 not restrained in any fashion nor did the agents threaten to restrain him. When he asked to use the
8 restroom, the agents told him where it was, and Perelman walked to and from the restroom unescorted.
9 Neither agent made a show of physical force or threatened Perelman with physical force. At no point
10 during the interview or while writing the statement did the agents threaten Perelman with arrest or
11 suggest that he was not free to leave. The agents informed Perelman that he could leave at any time.
12 Perelman drove himself to the clinic, and thus had the means to leave if he so desired. Neither agent
13 displayed a sidearm. The interview was not particularly lengthy, lasting only fifty minutes. All of these
14 facts weigh heavily against a finding of official coercion.

15 Nor does the evidence support Perelman's contention that the agents deceptively passed
16 themselves off as investigating a purely administrative matter by, among other things, presenting the
17 *Garrity* form, thereby rendering his statements involuntary. SA Fitzgerald specifically told both
18 Perelman and Blackburn that he was investigating a criminal matter. He later told Perelman that he and
19 SA Morse investigate crimes for the VA, such as false claims submitted to the VA, and that's what they
20 wanted to talk to him about. Thereafter the agents presented the *Garrity* form, on which they indicated
21 that the inquiry concerned "False Claims." SA Fitzgerald both read the form aloud and gave Perelman
22 the opportunity to read it himself. The form alerted Perelman that his statements could be used "in any
23 future criminal proceeding involving you." It further alerted Perelman, "You have the right to remain
24 silent if your answers may tend to incriminate you. If you do decide to answer questions or make a
25 statement, you may stop answering at any time." Perelman signed the form acknowledging that he
26 understood it and was speaking to the agents voluntarily.

1 None of the evidence supports Perelman's assertion that the agents deceptively acted as though
2 they were investigating an administrative matter. To the contrary, the evidence indicates that Perelman
3 was told repeatedly that VAOIG agents investigate criminal matters. The *Garrity* form did not
4 somehow erase the agents' representations about their role as VAOIG criminal investigators; nor was
5 it improper to present Perelman with a *Garrity* form, insofar as he was being questioned about activities
6 that could affect his employment with the VA. That Perelman may have failed to grasp that *he* was the
7 target of a criminal investigation when he made inculpatory statements to known special agents does
8 not, in itself, render those statements involuntary.

9 Finally, the evidence does not indicate that Perelman was so affected by the intoxicating effects,
10 if any, of his prescription medications that he lacked the capacity to competently waive his rights.³
11 Rather, the agents' testimony and the recording of the interview indicate that Perelman "was coherent,
12 gave responsive answers to questions, and was able to remember accurately [details]." *United States*
13 *v. George*, 987 F.2d 1428, 1431 (9th Cir. 1993) (citations omitted) (holding statements voluntary even
14 though defendant was in the hospital suffering from "an apparent drug overdose" inasmuch as his
15 injuries "did not render him unconscious or comatose"). Perelman's speech was clear, he seemed to
16 understand the questions he was being asked, and even challenged the agents' version of events. He
17 appeared to be oriented and responsive and had a notepad and pen with him to take notes during the
18 interview. Perelman also drove himself to the interview site and away from it. SA Morse testified that
19 had Perelman appeared intoxicated or otherwise incapacitated, he would have directed him to the clinic
20 for his own safety and for reasons of liability.

21 SA Fitzgerald noted that while Perelman walked with a limp, he didn't stumble, lose his
22 balance, or show any other signs of difficulty walking when he arrived at the clinic, went to the
23 restroom, or left the building. Though he took a pill during the interview, it did not appear to affect
24 Perelman's ability to participate in the interview. Rather, even as he was writing his statement,
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26 ³ While Perelman asserts in his Motion (#18) and Reply (#23) that the drugs, mixed with PTSD, diminished his capacity to waive his rights, the record contains no evidence that Perelman suffered from PTSD.

1 Perelman was actively engaged in how to characterize his actions. None of the evidence indicates that
2 Perelman was incapacitated by his medication, nor that his will was overborne by physical or
3 psychological coercion, so as to render his confession involuntary. The evidence indicates quite the
4 contrary.

5 **RECOMMENDATION**

6 Based on the foregoing, it is the recommendation of the undersigned United States Magistrate
7 Judge that Perelman's Motion to Suppress Involuntary Statements (#18) should be denied.

8 DATED this 1st day of June, 2010.

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10 **LAWRENCE R. LEAVITT**
11 **UNITED STATES MAGISTRATE JUDGE**
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